In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 768

LONNIE H. STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–9) is reported at 324 F. 2d 804.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1963. A petition for rehearing was denied on December 17, 1963. The petition for a writ of certiorari was filed on January 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion when it declined to allow a departure from its standing rule

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that the jury list could not be inspected prior to the first day of the trial term, where that was the day on which petitioner's trial was scheduled to commence.

STATEMENT

In the United States District Court for the Northern District of Florida petitioner was tried by a jury and convicted on all three counts of an indictment charging unlawful possession of an unregistered still, and related offenses under the liquor laws (R. 3–4, 93, 97).[1] On counts 1 and 2 petitioner was sentenced to imprisonment for three years, and on count 3 he was given a suspended sentence and was ordered placed on probation for five years commencing with his release from imprisonment (R. 94–95, 101–102). The judgment was affirmed by the court of appeals (324 F. 2d 804).

The trial in this cause had been set for Monday, December 3, 1962, as the first case of the trial term (R. 18, 37). One week prior to the scheduled trial date, counsel for petitioner made a request of the deputy clerk of the district court to inspect the list of jurors (R. 18–19). The deputy clerk informed him that, although the jurors had been drawn and summoned, the requested inspection would have to be refused (R. 19) under a standing order of the court dated December 4, 1961, which read:

> Effective this date the names of jurors drawn for service on the grand jury or the petit jury in this District, or any division thereof, shall not be disclosed or published to any persons whatsoever in the absence of further order of this Court until the day of the beginning of service of such jurors

[1] Citation is to the "Printed Record" in the court of appeals which has been filed with the Court.

for the term for which they have been subpoenaed.

> This procedure has been followed for a long time in many other Districts. While I am confident that our old system has not been abused to any great extent, we have, nevertheless, had enough occasions where it was to suggest the need of such a restriction as this. Indeed, I am inclined to believe that this will eliminate the possibility of many situations which, if not actual violations of the obstruction of justice statutes, give rise to possible suspicion and subject prospective jurors to annoyance if not pressure.[2]

On Thursday, November 29, 1962, petitioner moved for leave to inspect the list of jurors within the next day, or, in the alternative, for a continuance of trial to a later date in the term (R. 18–19). After oral argument thereon, the motion was denied (R. 20–21). The court noted that petitioner established no detriment and that the order applied to the United States Attorney as well as to counsel for petitioner (R. 20).

At trial on December 3, 1962, petitioner stated that he was not ready to proceed for the reasons asserted in his prior motion[3] (R. 37). The court overruled petitioner's objection (R. 37–38). During the voir dire examination (R. 41–73), counsel for petitioner asked numerous questions of the prospective jurors and exercised three of his ten peremptory challenges (R. 60, 65, 67). He then announced: "The defendant accepts the

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[2] The text of the order does not appear in the printed record, but it is set out in the opinion of the court of appeals (Pet. App. 2).

[3] Petitioner later stated for the record that he had received a copy of the jury list at 8:25 a.m. that day (R. 79).

jury, Your Honor" (R. 73). The jury was sworn and trial proceeded (R. 73).

ARGUMENT

There is no merit in petitioner's contention that the district court abused its discretion and deprived petitioner of due process of law when it denied him access to the jury list prior to the opening of the term, which was for him the day of trial. Congress has provided for furnishing a list of prospective jurors before trial only in treason and other capital cases. 18 U.S.C. 3432. This limited provision permits the inference that Congress felt no necessity for such a requirement in non-capital cases. *Hamer* v. *United States*, 259 F. 2d 274; 279 (C.A. 9), certiorari denied, 359 U.S. 916. In the absence of such a statutory requirement, the district court was empowered to make its own rules regarding the impaneling of jurors. See *Pointer* v. *United States*, 151 U.S. 396, 407–408; Rule 57(b), F.R. Crim. P. The fact that the drawing of the names must be public under 28 U.S.C. 1864 does not mean that the court may not make reasonable regulations as to the right to inspect the lists at a later time. *Wagner* v. *United States*, 264 F. 2d 524 (C.A. 9), certiorari denied, 360 U.S. 936.

Any regulation of court which fixes a time within which action may be taken will of necessity operate somewhat unequally depending on the scheduling of the calendar. The general order of the district court guarded against this possibility by providing that its limitations could be lifted in appropriate non-capital cases where a particular accused's pretrial need for the information outweighs the possibility that the prospec-

tive jurors might be subjected to extra-judicial pressure. In this case, however, the court decided, after hearing oral argument by counsel, that petitioner failed to demonstrate any possible detriment which would be occasioned by adherence to the standing order (R. 20). Petitioner shows no prejudice from that ruling. He was permitted to question the jurors during the voir dire examination, and he expressly announced acceptance of the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

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